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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. BUCK NELSON RICH, Defendant and Appellant.	E046965 (Super.Ct.No. FSB801428) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed in part and reversed in part with directions.

Michael A. Ramos, District Attorney, and Grover D. Merritt and Stephanie H. Zeitlin, Deputy District Attorneys, for Plaintiff and Appellant.

John E. Edwards, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Kristen Kinnaird

Chenelia and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Buck Nelson Rich was convicted by a jury of attempted criminal threats (count 1, Pen. Code, §§ 442, 664),[1] corporal injury to a spouse (count 2, § 273.5, subd. (a)), assault with force likely to produce great bodily injury (count 3, § 245, subd. (a)(1)), and attempted cruelty to a child by inflicting injury (count 4, §§ 273a, subd. (a), 664). He was sentenced to three years four months in prison. The People requested an order that defendant pay restitution to the Victim Compensation Board (the Board) in the amount of $881.30. Following a hearing, the court imposed restitution of $440.65, one-half the requested amount. Both defendant and the People have appealed.

Defendant contends an error in the written jury instruction regarding assault with force likely to produce great bodily injury requires reversal. The People assert the court erred in failing to impose restitution in the full amount requested. Although the court erred in instructing the jury as to assault with force likely to produce great bodily injury, we hold the error does not require reversal because it was not reasonably likely the jury misunderstood or misapplied the instruction in a way that violated defendant's constitutional rights. We agree with the People that the court erred in imposing only one-half the requested amount of restitution.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

I. SUMMARY OF FACTS

On April 1, 2008, defendant and his wife (Jane Doe) were at their home in Grand Terrace. That afternoon, their 14-year-old grandson, John Doe,[2] came into the house and started using a computer. Defendant began screaming at him to get off the computer, saying "I'm going to kick your motherfuckin' ass if you don't get off that goddamn computer." John said, "Okay," and got up from the computer. Jane told defendant to calm down. Defendant then began screaming and cussing at Jane. He said he would "knock the shit out of [her]." When she tried to calm him down, he grabbed her by the hair and started hitting her in the head with his fist.

John yelled at defendant to stop hitting Jane. Defendant told John, "I'll show you goddamn little son of a bitch, fucker. I'll show you. I can hit," and "Get out of the way, or I'll beat you[.]" As defendant walked toward John, Jane grabbed hold of defendant's shirt. She told John to run and call the sheriff. John ran into the kitchen. With Jane hanging onto defendant, defendant ran into the kitchen after John. As defendant ran after John, he continued to hit Jane with his fist. John heard defendant say that he was going to kill him and Jane. John ran outside.

After John fled, defendant hit Jane and knocked her to the floor. When Jane pushed herself up onto a couch, defendant pushed her head face down into a cushion and held her there for a "good minute, minute and a half." Jane could not breathe. As he held

[2] For ease of reference, we will refer to defendant's wife as Jane and defendant's grandson as John.

her down with one hand, he hit her on the back of the head with the other hand. When she was able to holler, "'I can't breathe,'" he shoved her over to one side. She then ran to the door and outside. As she ran out, defendant yelled, "If you come back in this house, I'll blow your motherfuckin' head off." Jane told him, "You messed up this . . . time." He responded, "I'm telling you, [Jane], if you step one foot on this property, I'll blow your motherfuckin' head off."

Defendant has six or seven loaded guns in a cabinet in the garage next to the house. Jane testified she believed if she went back inside the house defendant would get a gun and shoot her. When Jane reached the road outside her home, she called 911.

Sheriff's Deputy Ian Golditch responded to the 911 call. Inside the house, he found several guns in a locked gun safe. A handgun was loaded.

John testified he saw defendant hit Jane nine or ten times. Jane said defendant hit her at least 10 times, including hits to her arms, head, and chest. The hits caused bruises to her arms and chest. Pictures of the bruises were shown to the jury.

Jane testified that there had been a prior incident about two years earlier. On that occasion, Jane was lying on a couch when defendant stood over her, yelled at her, then kneeled down on her chest. He pinned her down for a couple of minutes. She had trouble breathing and tried to push him off. When she got up, he grabbed her from behind and squeezed her so she could not breathe. During the altercation, Jane's finger was broken. Jane told him then that she would call the sheriff if he laid his hands on her again.

Defendant did not testify.

II. ANALYSIS

A. *Jury Instruction on Assault With Force Likely to Produce Great Bodily Injury*

Defendant was charged in count 3 with assault with force likely to cause great bodily injury under section 245, subdivision (a)(1).[3] Among other elements of this crime (as it is alleged in this case), the People must prove that defendant willfully committed an act that by its nature would probably and directly result in the application of force to another (*People v. Colantuono* (1994) 7 Cal.4th 206, 214) *and* that the force used was likely to produce great bodily injury (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1139; § 245, subd. (a)(1)). Judicial Council of California Criminal Jury Instructions, CALCRIM No. 875, states these elements in the conjunctive, requiring that both be proved. The trial court correctly used the conjunctive when it orally instructed the jurors, stating: "To prove the defendant guilty of this crime [of assault with force likely to product great bodily injury], the People must prove the following: [¶] One, the defendant did an act that by its nature would directly and probably result in the application of force to a person. [¶] Two, the force used was likely to produce great bodily injury. [¶] Three, the defendant did that act willfully. [¶] Four, when the

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[3] Section 245, subdivision (a)(1) provides: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

defendant acted, he was aware of the facts that would lead a reasonable person to realize that by his act and its nature it would directly and probably result in the application of force to someone. [¶] *And* finally, when the defendant acted he had the present ability to apply force likely to produce great bodily injury." (Italics added.)

In contrast to the oral instructions and CALCRIM No. 875, the copy of the written instruction to the jury stated the first two elements in the disjunctive: "The defendant is charged in Count 3 with assault with force likely to commit great bodily injury. [¶] To prove that the defendant is guilty of [assault with force likely to produce great bodily injury], the People must prove that: [¶] 1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, OR [¶] 1B. The force used was likely to produce great bodily injury . . . ." The word "OR" is handwritten next to the printed word "and," through which a handwritten line has been drawn indicating that "and" has been replaced by "OR." There is nothing in the record that explains the change to the written instruction.[4]

Defendant contends the use of the disjunctive in the written instruction is reversible error. The People assert that although the written instruction is erroneous,

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[4] The written instruction also inexplicably used the word "commit" in the title of the instruction: "The defendant is charged in Count 3 with assault with force likely to commit great bodily injury." Section 245 and CALCRIM No. 875 use the word "produce," not "commit." Although defendant used italics and boldface in his brief to highlight the word "commit" when quoting the court's instruction, he does not assert any argument that the word choice requires reversal.

when the instructions are considered as a whole, it is not reasonably likely the jury misunderstood or misapplied the instruction. We agree with the People.

We independently review the legal correctness of jury instructions. (*People v. Griffin* (2004) 33 Cal.4th 536, 593; *People v. Posey* (2004) 32 Cal.4th 193, 218.) We do not review instructions in artificial isolation, but view them in the context of the overall charge. (*Middleton v. McNeil* (2004) 541 U.S. 433, 437; *People v. Huggins* (2006) 38 Cal.4th 175, 192.) "'Additionally, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) "If the charge as a whole is ambiguous, the question is whether there is a '"reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.]" (*Middleton v. McNeil, supra,* at p. 437.)

Here, the jurors were informed that, as to count 3, they could find defendant guilty of assault by means likely to produce great bodily injury, guilty of the lesser included offense of assault, or not guilty. They were first instructed as to simple assault. Thereafter, the court instructed them as to the greater offense of assault with force likely to produce great bodily injury. By following "assault" with the phrase, "with force likely to commit great bodily injury," the initial sentence of the written instruction for the greater offense indicates that the People must prove not merely an assault, but that the assaultive act was performed with the use of force likely to produce great bodily injury. The very next sentence suggests otherwise; it includes the erroneous disjunctive "OR"

between the actus reus element of assault (defendant did an act that by its nature would directly and probably result in the application of force to a person) and the requirement that defendant use force to produce great bodily injury. This second sentence, if read in isolation, indicates that defendant could be convicted of the crime even if the People did not prove the use of force likely to produce great bodily injury. These two sentences of the written instruction are therefore inconsistent, thus creating an ambiguity.

Initially, we note that it is patently unlikely that the jurors believed the crime of assault *with the use of force likely to produce great bodily injury* could actually be committed without the use of force likely to produce great bodily injury. This seems particularly apparent when, as here, the jurors were instructed as to both the lesser crime of simple assault and the greater crime of assault with force likely to produce great bodily injury. The only significant difference between the two crimes is that the use of force likely to produce great bodily injury and the present ability to apply such force are not required for the lesser crime and are required for the greater. The only reasonable way for the jurors to distinguish the two crimes is to interpret the ambiguous instruction on the greater offense as requiring the use of force likely to produce great bodily injury. To interpret the instruction in the manner suggested by defendant would essentially make the greater crime identical to the lesser, which would be unreasonable. We assume, of course, that jurors act reasonably.

In evaluating whether there is a reasonable likelihood that the jury misapplied an ambiguous instruction, we consider the arguments counsel made to the jury. (*People v.*

Huggins, supra, 38 Cal.4th at p. 192.) This is particularly appropriate when the prosecutor's arguments resolve an ambiguity *in favor of the defendant*. (*Middleton v. McNeil, supra*, 541 U.S. at p. 438.) Regarding count 3, the prosecutor made the following argument to the jury: "[T]his is assault with force likely to cause great bodily harm or death, injury. There is [*sic*] a few elements we need to prove. First, act by its nature that would directly and probably result in force. Easy way of saying that. You do something that would—you know would apply force to someone else. Obviously if I go up to any one of you or anyone else and hit you or swing my first right next to you, it's going to hit you. So I know it's going to apply force. I know it seems like an everyday thing, but that's specifically what that element addresses. Knows by his action he would apply force, and hitting someone is just that. Force likely to produce great bodily injury. [¶] The testimony in the case, the number of hits as testified to by not only Jane Doe, by her grandson. Not only the hits themselves, but the entire course of conduct. The conduct where the defendant took Jane Doe and stuffed her face into the cushion where she couldn't breathe. Obviously, if you can't breathe, it's likely to cause great bodily injury. That could lead to serious consequences. [¶] And if you're hit multiple times over and over again, it's going to cause serious problems. Also, keep in mind that Ms. Doe had a rotator cuff surgery a couple months before. So all the things the defendant did to her could have aggravated that as well. Fortunately it didn't. You heard her say it just became a little sore. [¶] We don't actually have to prove that she had this great bodily injury. It's the conduct itself that's likely to produce great bodily injury. And

how do you show that? The number of hits, the specific conduct. Stuffing her face into the cushion. That shows that it was force likely to produce great bodily injury. It wasn't like one hit and he left. That would be a simple battery. But this was far beyond. Multiple blows, multiple injuries, multiple conduct." In this argument, the use of force likely to produce great bodily injury is unambiguously presented as one of the facts the People must prove. There is no hint or suggestion by the prosecutor that the jurors could convict defendant of count 3 without finding that the force used to commit the assault was force likely to produce great bodily injury.

Finally, although the written instruction was ambiguous, the oral instruction to the jury was not. In the oral instruction, the court used the conjunctive term "with" in the first sentence of the count 3 instruction and then correctly used the conjunctive "and" in setting forth the specific elements of the crime. Generally, when there is a discrepancy or conflict between a written instruction and an oral instruction, the written instruction will control. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 717; *People v. Wilson* (2008) 44 Cal.4th 758, 803.) This does not mean, however, that the oral instructions are irrelevant in evaluating whether the overall charge is improper; "the jury is not informed of this rule [that the written instructions control, and it] is . . . possible the jury followed the oral instruction." (*People v. Wilson*, *supra*, at p. 804.)

In light of the reasonableness of the interpretation of the instruction that the crime of assault with the use of force likely to produce great bodily injury actually requires the use of such force (and the unreasonableness of the contrary interpretation), the argument

by the prosecutor, and the unambiguous and proper oral instruction, we conclude that it is not reasonably likely that the jurors misunderstood the instruction in a manner that violated the Constitution. Accordingly, we reject defendant's argument.

B. *Restitution to the Board*

On behalf of the Board, the People requested an order for restitution in the amount of $881.30. The request was based upon the Board's payment of $881.30 for "Residential Security" expenses for the victim. At the restitution hearing, defendant conceded that the expenses claimed by the Board were proper expenses for a restitution claim. His counsel argued, however, that defendant "has already paid this." He explained: "[M]y argument is if she [the victim] paid the money for the system, that was their money. He's paid if not all of it, at least half of it under California community property law. Half would be his. Half would be hers. I think the most the Court could order would be half of $881.30." Counsel believed the Board "should be going back to [the victim] and saying we have compensated you in error. They [the Board and the victim] can work it out. I don't think it should be taken out of [defendant's] prison earnings." The court agreed, and ordered restitution in the amount of $440.65—one-half the amount requested.

Under section 1202.4, subdivision (a), the "court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . [¶] . . . [¶] [r]estitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment." Subdivision (f) of section

1202.4 provides that, except in situations not relevant here, "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." "The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).)

The statute further provides: "To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct . . . ." (§ 1202.4, subd. (f)(3).)

When restitution is ordered pursuant to section 1202.4, subdivision (f), it "shall be ordered to be deposited to the Restitution Fund to the extent that the victim . . . has received assistance from the [Board]." (§ 1202.4, subd. (f)(2).) The amount of the assistance provided by the Restitution Fund "shall be established by copies of bills submitted to the [Board] reflecting the amount paid by the [B]oard . . . ." (§ 1202.4, subd. (f)(4)(B).) Such amount "shall be presumed to be a direct result of the defendant's criminal conduct and shall be included in the amount of the restitution ordered." (§ 1202.4, subd. (f)(4)(A).)

Here, there is no dispute that Jane suffered an economic loss for which restitution may be ordered under section 1202.4.[5] The People submitted evidence establishing the amount of that loss at $881.30 and the payment of such amount by the Board. Defendant does not dispute the sufficiency of such evidence. Nor does defendant dispute that the statutory presumption that the Board's payment was a direct result of defendant's criminal conduct had been triggered. Defendant offered no evidence to rebut the presumption. In light of these facts, it follows from the applicable statutes that "the amount of assistance provided"—in this case, $881.30—"shall be included in the amount of the restitution ordered." (See § 1202.4, subd (f)(4)(A).)

The trial court's halving of the amount of the restitution order based upon community property principles, we believe, is without support in either the statutory scheme for restitution or in the evidence submitted in this case. First, there is no provision in the restitution statutes or the statutes governing victim assistance by the Board for consideration of community property principles in determining the amount of the restitution order. The restitution order is to be made against the defendant in favor of the Board and "shall be of a dollar amount that is sufficient to fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's criminal

[5] The expense is described by the Board as payment for "Residential Security." Under Government Code section 13957, subdivision (a)(6)(A), the Board is authorized to pay "for the expense of installing or increasing residential security, not to exceed one thousand dollars ($1,000)."

conduct . . . ." (§ 1202.4, subd. (f)(3).) Based upon the evidence submitted and the applicable presumption, the full dollar amount of $881.30 was mandatory.[6]

Second, to the extent that community property rules or set-off principles could bear upon the determination of the amount of the restitution order, there is no evidentiary support for defendant's argument that he had "already paid" half of the expense. The argument assumes that Jane paid the expense for which restitution is sought and that she paid the expense from community property funds. However, there is no evidence to support this claim. Defendant's counsel merely asserted hypothetically at the hearing that "*if* [Jane] paid the money for the system, that was their money." (Italics added.) In fact, there was no evidence that Jane paid the expense—from a community property source or otherwise. The evidence submitted at the restitution hearing includes invoices for certain expenses and a declaration that the invoices were "submitted to and paid *by the Board* . . . ." It thus appears that the Board paid the entire expense, not Jane, and that neither community property funds nor defendant's separate property was used.

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[6] Community property issues could arise in connection with the source of funds for *payment* of a victim restitution order. Under Family Code section 782, it appears that a spouse's liability to another spouse for injuries caused by his or her wrongful acts must first be satisfied from the wrongdoer's separate property. (Fam. Code, § 782, subd. (a).) Community property may be used to discharge such liability only after the defendant's separate property has been exhausted. (*Ibid.*) These rules, however, are relevant to the *enforcement* of the order for victim restitution, not to the determination of the *amount* of restitution. Because we are concerned with the court's determination of the amount of restitution owed to the Board, we do not reach such issues.

Because there is neither a legal nor evidentiary basis for the trial court's restitution order, we reverse that order and direct the entry of a new order for restitution in the amount of $881.30.

III. DISPOSITION

The conviction is affirmed. The order imposing restitution to the Board in the amount of $440.65 is reversed. The trial court is directed to enter a new order imposing restitution in the amount of $881.30.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.